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STATE OF WASHINGTON

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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,
vs.

CYNTHIA CASTILLOTE BLANCAFLOR

APPELLANT.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 10-1-02165-7

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This is an appeal from a conviction by way of jury trial. The jury found the defendant Cynthia Blancaflor guilty of three counts of Evading Industrial Insurance Premiums and guilty of Theft in the 1st degree. Mrs. Blancaflor was sentenced to 4 months imprisonment.

Prior to trial the defendant Mrs. Blancaflor expressed her concern to the court as to the effectiveness of her attorney. Mrs. Blancaflor requested a new attorney or to proceed pro se, but her request was denied. After the trial Mrs. Blancaflor's attorney informed her he was not clear on the issues of her case.

II. ASSIGNMENTS OF ERROR

A. Was Defense Counsel Ineffective at Trial:

- i. Was Defense Counsel Ineffective by failing to raise a Confrontation Clause objection when the person who generated the audit report and conclusion did not testify or if unavailable, provide a prior opportunity to cross-examine?
- ii. Did defense counsel present a defense since he did not introduce any evidence refuting intent or knowledge?

B. Was the Elements of the Crime Proven to Convict?

- i. Did the prosecution prove that Mrs. Blancaflor acted with intent to evade paying premiums to Department of Labor and Industries?
- ii. Did the prosecution prove that Mrs. Blancaflor had knowledge that employees went unreported to Department of Labor and Industries?

C. Should the Court have granted a new attorney or pro se representation?

- i. Was it improper for Dana Ryan to continue representation of Mrs. Blancaflor when he did not understand the issues of her case?

III. STATEMENT OF CASE

The allegations arose when two individuals, Elvira Viray and Edward Hoff, made a complaint to the Department of Labor about back wages owed to them from My Grandma's House an elder care facility. CP p. 283; L, 21. My Grandma's House, LLC is owned by Othniel Blancaflor and Cynthia Blancaflor, the defendant. CP p. 745; L, 7-8. After Elvira and Edward requested the Department of Labor to acquire their back pay, an investigation of My Grandma's House commenced. CP p.155; L, 15-17.

On May 19, 2010, Cynthia Blancaflor was charged with three counts of Employer's False Reporting or Failure to Secure Payment of Compensation because it was alleged that over a three year period, My Grandma's House, LLC failed to properly report covered workers to the Department of Labor and Industries, to circumvent paying the correct premiums. CP p.1; L, 17-18. Additionally, Mrs. Blancaflor was charged with Theft in the first degree because it was alleged that My Grandma's House failed to pay two individuals, Elvira Viray and Edward Hoff, wages they were owed, aggregating over \$5000. CP p. 1; L, 18.

On June 2, 2010, Mrs. Blancaflor pleaded not guilty. Docket No. 10-1-02165-7. Additionally, on September 2, 2011, the court denied Cynthia Blancaflor's petition for a new public defender or pro se representation, even after she reported that her attorney was not competent to represent her. Docket No. 10-1-02165-7. Mrs. Blancaflor informed the court of the lack of communication between her and her attorney, and the court denied her request for a new attorney. Docket No. 10-1-02165-7. The case proceeded to trial, with Mr. Ryan still representing Mrs. Blancaflor, on September 12, 2011. On September 22, 2011 Mrs. Blancaflor was found guilty of all charges against her, by the jury. CP p. 1005- 1006; L20-25; L1-

7. A sentencing occurred on November 12, 2011. SP p. 3; L, 13-15.

At her sentencing Mrs. Blancaflor's range was 0 to 12 months for Employer's False Reporting or Failure to Secure Payment of Compensation and 4 to 6 months for Theft in the 1st degree. CP p. 10; L10-12. On November 12, 2011, Mrs. Blancaflor was sentenced to 4 months imprisonment. SP p. 10; L13-14. Prior to commencement of trial, Mr. Ryan failed to file any motions or tag any evidence and reported he was ready for trial. CP p. 5, 8; L, 1-3.

My Grandma's House, LLC was purchased by Othneil Blancaflor from Maria Orth in 2005. CP p. 745; L, 10. On the business certificate, filed with the state, My Grandma's House's (MGH) listed Othneil Blancaflor as the registered agent and the company's contact person. CP p. 98-99; L25 and L1-3. Although both Othneil and Cynthia owned My Grandma's House, they both had different task in operating the business. Othneil was responsible for payroll and bookkeeping (CP p. 747; L, 15-17), while Cynthia was responsible for patient contracts through DSHS. CP p. 842; L, 10-11. Othneil decided to keep and use the prior owner's method of bookkeeping and payroll. CP p. 747; L, 15-22. Maria, the previous owner, trained Othneil in the bookkeeping

procedures for My Grandma's House, LLC (MGH). CP p. 747; L, 3-6. Othneil was to send employer information, regarding hours worked and payment to Sutton McCann, an accounting firm. CP p. 747; L 15-17.

In 2006, one year after the Blancaflor's became the new owners, My Grandma's House's financial situation was unstable. CP p. 749; L, 3-5. In order to break even, Mr. Blancaflor indicated that MGH needed to be filled with six patients. CP p. 750; L, 8-11. However, in 2006, MGH dropped down to three patients and at times two patients. CP p. 749; L, 14-15. Although MGH had dramatically dropped in revenue, due to lack of patients, its expenses were still high because Othneil, responsible for payroll, but did not downsize the employees. CP p. 749; L, 14-15. In order to make due and pay the employees and other business expenses, Othneil liquidated his personal assets. CP p. 749; L, 19-20.

However, in 2007, My Grandma's House's high expense and low revenue took its toll and MGH could no longer afford to keep Sutton McCann as its accountant. CP p. 751; L, 6. After losing Sutton McCann, due to non-payment, Othneil decided to take over as MGH's accountant and continue overseeing the payroll. CP p. 751; L, 6. As MGH's new accountant and head of payroll, Othneil

decided to convert his two employees, Elvira Viray and Edward Hoff, into independent contractors. CP p. 751; L, 6-7. Othneil informed both employees, in a meeting, that they would now have to file their own taxes on a 1099 form. CP p. 751; L, 16-21. A second meeting was held on January 3, 2008 with the two employees, Othneil, and Cynthia present. CP p. 752; L, 2-5. For the remainder of the time that My Grandma's House's was in operation, Othneil treated the workers as independent contractor and continued to maintain the books and payroll. CP p. 796; L, 13-17.

Othneil perceived it would be legal to treat the workers as independent contractors because he did the same thing when working for Hillside Lumber. CP p. 796; L, 18-22. Mr. Blancaflor worked at Hillside Lumber for 11 years, managing their books and payroll for over 16 workers. CP p. 744; L, 9. After Mr. Blancaflor left Hillside Lumber, he started his own lumber brokerage firm. CP p. 744; L, 9. Prior to trial, Mr. Blancaflor never heard of a six-part test that he must apply to determine whether his employees are considered covered workers. CP p. 796; L, 23 – p. 797; L, 1. Therefore, he did not apply that test when he decided to stop paying the premiums to L&I. CP p. 797; L, 2-5. Additionally,

Othneil did not consult with Cynthia before he decided to stop paying MGH's Labor and Industry premiums; it was his sole decision. CP p. 797; L, 6-7. Mrs. Blancaflor was not made aware of problems with L&I premiums until September of 2009, at her bankruptcy hearing. CP p. 871; L, 10-15.

Cynthia Blancaflor was the sole financial provider for her and her husband Othneil. CP p. 872; L, 6. My Grandma's House was creating more expense than it was creating revenue and it fell on the shoulders of Cynthia. CP p. 872; L, 6-7. Therefore, while Othneil handled the employees and the day-to-day activities with MGH, Cynthia went to work for eight hours a day at the Department of Labor and Industries. CP p. 270; L, 14-16.

Mrs. Blancaflor began working for Department of Labor and Industries as an auditor, in March of 2006 and began training in April of 2006. CP p. 837; L12-14. At the start of the audit, Mrs. Blancaflor was a journey auditor level III, performing hundreds of audits on other business and organizations. CP p. 94; L, 8-9.

The Department of Labor and Industries commenced an audit of My Grandma's House, LLC in September of 2009 based on a recommendation from the Employment Standards Unit. CP p. 79; L, 20-21. Mary Tunis was ordered to supervise the audit, but

Pamela Cormier was actually assigned to the audit and conducted the audit, creating an audit report. CP p. 96; L, 19-20. However, Mary Tunis testified as to the contents of the report and as to the conclusion formed by Pamela Cormier, concluding My Grandma's House, LLC was in violation of RCW 51.48.020(1)(b)(i). CP p. 240; L, 22-25; p. 241; L, 1-7.

During trial, the co-defendant, Othneil Blancaflor informed the jury that he did not report the workers to the Department of Labor and Industries because he re-classified them as independent contractors beginning in 2008 and/or they were part time employees. CP p. 754-760; L, 15. When Mr. Blancaflor decided to convert his current employees into independent contractors, he did not consult with his previous accountant, with his wife, or the Department of Labor and Industries before making the decision. CP p. 826; L, 21-25; p. 827; L 1-11. The decision was solely his. CP p. 813; L, 4-6.

Othneil Blancaflor worked seven days a week without pay, to ensure the success of My Grandma's House, LLC. CP p. 803; L, 9-15. His co-owner, Cynthia also worked seven days a week, five days at the Department of Labor and Industries, to contribute to her husband's dream. CP p. 803; L, 16-21. Cynthia left for work,

Monday through Friday, at 6:30 a.m. and did not return home until 5:00 p.m. CP p. 803-804; L, 22-5. When she returned home, she contributed to My Grandma's House by performing her duties for the business, patient records and admission. CP p. 804; L, 6-10. Due to his wife's full time job, Othneil did not bother her with payroll issues and/or questions; instead he took his paperwork to H&R Block. CP p. 805; L, 13-17. Cynthia Blancaflor was never responsible for the payroll, the taxes, or employee reporting at My Grandma's House, LLC. CP p. 810; L, 1-4.

IV. ARGUMENT

Mrs. Blancaflor, the defendant, asserts that defense counsel was ineffective at trial for failing to raise a Confrontation Clause objection and for failing to present a defense. The defendant asserts that insufficient evidence existed to convict because intent and knowledge were not shown. Additionally, the defendant asserts that the court should have granted her request for a new attorney or pro se representation and/or Dana Ryan should have recused himself from the case, since he did not understand the issues at trial.

A. DEFENSE COUNSEL WAS INEFFECTIVE AT TRIAL AND THIS PREJUDICED THE DEFENDANT.

Under the sixth amendment of the United States Constitution and article I, section 22 of the Washington State Constitution a defendant is guaranteed the *right to effective assistance of counsel in all criminal proceedings*. *Strickland v. Washington*, 466 U.S. 688, 684-686, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 7, 917 P.2d 563 (1996). To effectively challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. First, petitioner must show defense counsel's representation was deficient. Second, the petitioner must show that defense counsel's deficient representation prejudiced the defendant. *Id.* Deficient representation is representation that fell below an objective standard of reasonableness based upon consideration of the totality of the circumstances. *Id.* A defendant is prejudiced when there is a reasonable probability that except for defense counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

The court will not find ineffective assistance of counsel if the complained about actions of defense counsel go to the theory of the case or trial tactics. *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

On the other hand, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining defense counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Not all strategies or tactics on the part of the defense counsel are immune from attack. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.ED 2d 985 (2000).

Ineffective assistance of counsel is a mixed question of law and fact. Cases with a mixed question of law and fact are reviewed de novo. *In Re Pers. Restraint Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Mrs. Blancaflor, the defendant, asserts that her attorney was ineffective in several ways. First, defense counsel failed to raise a Confrontation Clause issue when Mary Tunis testified about the audit of My Grandma's House, LLC, instead of the actual auditor, Pamela Cormier. Second, defense counsel failed to simply present a defense, since he did not present any evidence to refute intent to evade and/or knowledge of unreported workers to the Department of Labor and Industries. Defense counsel's ineffective assistance

of counsel prejudiced Mrs. Blancaflor and the outcome of the trial would have most likely been different had she received competent representation.

- i. **It was ineffective assistance of counsel to allow Mary Tunis to testify about Pamela Cormier's audit report and audit results, without objection because it violated Mrs. Blancaflor's Sixth Amendment Right to Confrontation.**

The Sixth Amendment guarantees the right to confront witnesses who bear testimony against a defendant and proper confrontation is achieved through cross-examination. *U.S.C.A. Const. Amend 6; Crawford v. Washington*, 541 U.S. 36 (2004). Thus a witness's testimony against a defendant is inadmissible, unless the witness appears at trial, or if the witness is unavailable, the defendant had a prior opportunity to cross-examine the witness. *Id.* at 54. Testimonial statements are those "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Id.* at 52.

Further, in *Melendez-Diaz*, the Supreme Court ruled that electronic evidence generated in preparation for trial raises Confrontation Clause concerns if the individual creating the evidence does not testify at trial, or is not prior cross-examined. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009). The Supreme Court in this case concluded that the electronic evidence (test results of a drug), amounted to live in-court testimony because it proved a fact the prosecution claimed; the drug found on the defendant was cocaine. *Id.* at 2532 (citing *Davis v. Washington*, 574 U.S. 813, 830 (2006)). The Supreme Court reasoned that cross-examination of an expert testifier and not the analyst who performed the tests defeats the purpose of the Confrontation Clause because the expert testifier lacks personal knowledge. *Id.*

Here, like in *Melendez-Diaz*, Mary Tunis, the supervisor, testified at trial about the audit results and the audit report, instead of the auditor Pamela Cormier. CP p. 96; L, 20. The very nature of the audit is to examine if a business has violated the RCWs by not reporting workers to evade paying premiums, so it is conducted in anticipation of trial, rendering it testimonial. CP p. 79; L. 17-23. In *Melendez-Diaz*, the analyst's supervisor testified at trial about the

results of the test, in which the analyst performed, like in this case. Pamela Cormier, the auditor, interviewed the Blancaflors, interviewed the alleged workers, went over the bank registries and put all of the information into several of Department of Labor and Industries databases. CP p. 96; L, 20. Afterwards, based on the imputed information, the database generates an amount owed in premiums. CP p. 160. Also, Pamela Cormier conducted the six-part test on the employees and accessed whether each worker was a covered worker or an exempted worker. CP p. 171; L, 14. Additionally, Pamela Cormier wrote the audit report that Mary Tunis drew her testimony from. CP p. 174. Therefore, Pamela Cormier should have testified because Mrs. Blancaflor has the right to confront those who bear testimony against her, and a substitute, a supervisor, does not suffice.

Furthermore, like in *Melendez-Diaz*, here the audit results and the audit report were used to prove a fact for the prosecution: premiums went unpaid and employees went unreported. The audit and audit report was done in anticipation of trial or under circumstances that would lead reasonable person to believe their statements would be used at a later trial or for future prosecution, which makes it testimonial. CP p. 78-80; L, 15-10. Therefore,

Pamela Cormier's audit and report were testimonial hearsay which is inadmissible, unless the declarant has the opportunity to be cross-examined either during trial or if unavailable, prior to trial.

It was ineffective assistance of counsel for Dana Ryan to refrain from objecting to the entrance of the audit report and the audit results into evidence. It is objectively reasonable for an attorney to object when their client's Constitutional rights are being infringed. In fact, a lawyer's purpose is to protect its client's Constitutional rights, so when he/she fails to protect, their representation is ineffective. Since Mrs. Blancaflor's rights were violated, due to defense counsel's incompetent representation, she was prejudiced at trial. Therefore, the court should over turn Ms. Blancaflor's conviction because her counsel was ineffective and due to his ineffective assistance, her constitutional rights were infringed.

**ii. It was ineffective assistance of counsel for
Dana Ryan to fail to present a defense.**

As part of the charge against Mrs. Blancaflor, Employer's False Reporting or Failure to Secure Compensation, the prosecution must show that she intended to evade determination

and payment of the correct amount of premiums and that she had knowledge that workers were going unreported to the Department of Labor and Industries. RCW, 51.48.020(1)(b)(i). Additionally, the crime requires the prosecution to prove that the defendant knowingly makes misrepresentations regarding payroll or employee hours or knowingly fails to secure payment of compensation or knowingly fails to report the payroll or employee hours related to that employment. RCWA, 51.48.020(1)(b)(i-ii).

Defense counsel, Dana Ryan, fell beneath an objective standard of reasonableness when he failed to introduce any evidence to refute Mrs. Blancaflor's intent to evade and/or knowingly made misrepresentation or knowingly failed to report employees. Defense counsel only put one witness on the stand, Mrs. Blancaflor, and introduced no evidence. CP p. 835; L, 17-18. After her testimony, defense counsel rested. CP p. 912; L, 18-19. Mrs. Blancaflor's knowledge of the unreported workers was an issue at the center of her trial because she worked for Department of Labor and Industries. CP p. 834; L, 20-22. The prosecution's claim was that since she worked for the department, she knew what workers should be reported and how to properly report them. CP p. 934; L, 11-15. Nonetheless, defense counsel did not present

any evidence showing that Mrs. Blancaflor was not responsible for reporting the employees for My Grandma's House and therefore could have potentially not known the employees were going unreported. Defense counsel did not present any evidence of how My Grandma's House's classified its workers and the methods used or person used to report such workers. Therefore, because no such evidence was presented at trial to refute intent and knowledge and/or provide another explanation for the errors to the jury, Mrs. Blancaflor representation was ineffective and she was prejudiced so a new trial is warranted.

**B. THE EVIDENCE WAS INSUFFICIENT TO PROVE
THE CHARGED CRIME OF EMPLOYER'S FALSE
REPORTING OR FAILURE TO SECURE
COMPENSATION.**

In a criminal case, evidence is insufficient to support the verdict, if after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wash. 2d 216, 221, 616 P. 2d 628 (1980). The crime of Employer's False Reporting or Failure to Secure Compensation,

requires the prosecution to prove that the defendant, with the intent to evade paying the correct premiums, knowingly made false representations regarding payroll or employee hours or knowingly failed to secure payment of compensation or knowingly fails to report the payroll or employee hours to the Department of Labor and Industries. *RCW, 51.48.020(1)(b)(i-ii)*. Here, viewing evidence in light most favorable to the prosecution, the evidence was insufficient to prove that Mrs. Blancaflor intended to evade and knowingly misrepresented or failed to report employees, beyond a reasonable doubt.

i. The evidence presented was insufficient to prove that Ms. Blancaflor had intent to evade paying the proper insurance premiums.

In a criminal proceeding, the prosecution is required to prove each element of the crime(s) charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068. The crime charged, Employer's False Reporting, requires the defendant to have intent to evade determination and payment of the correct amount of premiums to the Department of Labor and Industries. A criminal

defendant acts with intent when he or she acts with the objective or purpose to accomplish the crime charged. *RCW*, 9A.08.010(1)(a).

The notion that guilt is personal and that business partners are not criminally responsible for the crimes of another partner, merely because of the partnership relationship, has long been established. *Munoz v. State*, 87 Fla. 220, 222 (1924). In order for a business partner to be held criminally liable for crimes committed by another partner, he or she must personally participate in the criminal act or have knowledge of it. *Id.* Here, Mrs. Blancaflor is not criminally liable for the criminal acts of Othneil Blancaflor.

Othneil Blancaflor, co-owner of My Grandma's House, LLC (MGH) and the co-defendant, testified that he was solely responsible for the accounting and payroll of MGH. CP p. 747; L, 15-17. He informed the court that he was solely responsible for changing the status of employees to independent contractors and for reporting employees to Department of Labor and Industries. CP p. 747-748. Mrs. Blancaflor never reviewed MGH's books, reported its employees, or organized the payroll because she had different duties for the business. CP p. 804; L, 6.

Mrs. Blancaflor was responsible for patient admission and contracts, and DSHS compliance, not payroll. CP p. 805. During

trial, the evidence presented was not sufficient to show an intent to evade because Mrs. Blancaflor did not know that L&I premiums went unpaid. She testified that she did not find out there was a problem with MGH's premiums until September of 2009, much after the events took place.

The prosecution presented evidence at trial indicating that on several occasions, Mrs. Blancaflor would interact with the employees and paid the employees for Mr. Blancaflor.

Nonetheless, interacting with employees and handing them their checks, does not constitute intending to evade detection of the employees to evade paying their premiums. The evidence simply suggests that Mrs. Blancaflor would occasionally help out her husband and business partner with the employees. However, the evidence does not suggest that Mrs. Blancaflor was keeping something from the Department of Labor and Industries.

In addition, the prosecution places undue weight on the fact that Mrs. Blancaflor worked for the Department of Labor and Industries, arguing that intent is clear. However, the fact the Mrs. Blancaflor worked for L&I furthers her argument of lack of knowledge, therefore lack of intent. Mrs. Blancaflor worked five days a week with L&I and only worked two days a week at MGH.

Her frequent absence from the day-to-day business of MGH, kept her in the dark. Othneil never came to Cynthia Blancaflor seeking advice or assistance with payroll or employee premiums. He handled it himself. Therefore, since guilt is personal and Mrs. Blancaflor had no idea a crime was being committed, she could not have acted with the objective or purpose to evade the detection and payment of the right amount of premiums. Henceforth, viewing the evidence in the light most favorable to the prosecution, no reasonable trier of fact would conclude that Mrs. Blancaflor intended to evade detection or paying premiums of employees, beyond a reasonable doubt, so her conviction should be reversed.

ii. The evidence is insufficient to establish that Mrs. Blancaflor knowingly made misrepresentations regarding payroll or employee hours or knowingly failed to report employees to the Department of Labor and Industries.

In order to prove the mens rea knowingly, the prosecution must prove knowledge as to all material elements. *State v. Hull*, 83 Wash.App 786 (Div. 2 1999). Mrs. Blancaflor and Mr. Blancaflor

testified that Mrs. Blancaflor did not have any idea how the payroll was handled for My Grandma's House. At one point in time, Cynthia called the L&I to cancel MGH's account. However, that was only after Othneil had already requested the account be closed several times. Nonetheless, when Mrs. Blancaflor helped Othneil out by trying to get the account closed, the facts do not indicate that she made any reporting to the Department of Labor. In fact, throughout the entire trial, the only time Cynthia contacted L&I on behalf of MGH was the one time she made an interoffice call to cancel MGH's account. During that call, all Mrs. Blancaflor did was made a request, not a report. Additionally, Mrs. Blancaflor did not knowingly fail to report employees because she was not responsible for reporting the employees and she did not have knowledge of whether they were reported or not. She was swamped with work at the Department of Labor and Industries so her focus was elsewhere. Plus, simply because Mrs. Blancaflor was employed with L&I, she did not have knowledge of unreported employees. She maintained her portion of the business and complied with DSHS regulations. She did not have the time to concern herself with Othneil's duties, refuting knowledge. Therefore, the evidence is insufficient to establish that Mrs.

Blancaflor knowingly made misrepresentations or false reports to L&I. The evidence suggests that Mrs. Blancaflor did not make any representations or reports to L&I in reference to MGH. So with the evidence viewed in the most favorable light to the prosecution, no reasonable fact finder would find that Mrs. Blancaflor knowingly made misrepresentations or knowingly failed to report employees.

**C. THE TRIAL JUDGE ERRORED WHEN SHE DID NOT
GRANT MRS. BLANCAFLOR'S REQUEST FOR A NEW
ATTORNEY OR PRO SE REPRESENTATION.**

Ten days prior to trial, Cynthia, the defendant, requested the court appoint her a new attorney or permit her to represent herself. Nonetheless, the court, in error, denied her request. Additionally, Cynthia asked her attorney to recuse himself, since he did not understand the issues in this case; however, he did not comply.

Under RPC 1.1, a lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *Id.*

The sixth amendment requires defense counsel to act as a reasonably competent criminal defense attorney would in the same

or a similar situation. The Ninth Circuit has held that pretrial investigation and preparation are the keys to effective representation of counsel. *U.S. v. Tucker*, 716 F.2d 576, 581 (1983). Additionally, adequate consultation between the attorney and the client is an essential element of competent representation of a criminal defendant. *Id.* at 581.

Here, Mr. Ryan, defense counsel, provided incompetent representation for several reasons. First, throughout pretrial preparation, Mr. Ryan only spoke with Mrs. Blancaflor, the defendant twice. Second, Mrs. Blancaflor provided Mr. Ryan with evidence he could have presented to refute key elements of the crime against her and he refused. Finally, Mr. Ryan, even after the trial, was confused on the issues of the case and therefore did not present a defense.

As in *Tucker*, Mr. Ryan only had to prove that Mrs. Blancaflor did not have the intent and/or knowledge of the crimes she was charged with. However, he did neither. Additionally, after the trial was over and Mrs. Blancaflor was convicted, Mr. Ryan informed her that he was still confused on what the issues of her trial were. This indicates that Mr. Ryan was not competent enough

to defend Mrs. Blancaflor on this case; thereby prejudicing her, requiring a new trial.

Additionally, the whole year and a half leading up to trial, Mr. Ryan only contacted Mrs. Blancaflor twice and both times were in August of 2010, the month right before trial. As indicated by the Ninth Circuit, client communication is essential to competent representation in a criminal proceeding. However, here, Mr. Ryan did not communicate with his client, rendering his representation incompetent and prejudicing Mrs. Blancaflor.

Although Mr. Ryan was confused with the issues of the case, he denied evidence and information to help the case from Mrs. Blancaflor. Mr. Ryan would simply tell Mrs. Blancaflor that the evidence she presented him would not help her case. However, he was unclear of the issue of her case, so how would he know what evidence would help. Thus, Mr. Ryan presented no evidence at all. Therefore, it was incompetent to not accept evidence from his client that would help the client's case.

Mrs. Blancaflor requested the court to appoint her a new attorney because of Mr. Ryan's unfamiliarity with the area of law she was being charged under, and the court denied her request. Therefore, Mrs. Blancaflor was prejudiced because Mr. Ryan's

incompetence and his unwillingness and/or failure to become competent before trial caused her to not receive a fair trial.

A. CONCLUSION

The defense attorney was ineffective at trial and this ineffectiveness prejudiced Mrs. Blancaflor, because her Sixth Amendment right to Confrontation was abridged and Mr. Ryan failed to present a defense. Additionally, the evidence presented at trial was insufficient to establish that Mrs. Blancaflor intended to evade or knowingly made misrepresentations. For these reasons, the defendant respectfully requests the court to grant her a new trial.

Respectfully submitted this June 11, 2012.

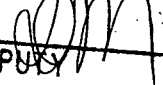


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CERTIFICATE OF SERVICE

I Kenneth W. Blanford, hereby certifies under penalty of perjury under the laws of the State of Washington that on the day set out below, I delivered true and correct copies of the opening brief of the appellant to respondent by ABC-Legal Messengers, Inc., to:

ATTORNEY GENERALS OFFICE
CRIMINAL JUSTICE DIVISION
800 FIFTH AVE SUITE 2000
SEATTLE, WA 98104

Signed at Tacoma, Washington this June 11, 2012.



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